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IN THE SUPREME COURT
of the United States

..... TERM, ...

IN THE MATTER OF THE PETITION OF NEW ENGLAND FISH CO. OF OREGON, a corporation, owner, and NEW ENGLAND FISH COMPANY, a corporation, charterer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability.	CLAIM OF HAZEL KRUSE and CARL J. HANSEN Personal Representatives of dependents of deceased seamen, to recover damages for their wrongful death.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Ninth Circuit

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SUMMARY STATEMENT OF MATTER INVOLVED

The owner and charterer of the Diesel Fishing Tender O. M. ARNOLD sought to limit their liability under the provisions of the Limitation of Lia-

bility Act. After setting up the incorporation of the owner and charterer of the fishing tender, it was alleged that on August 17, 1939, the vessel was wrecked when on a voyage to gather fish in Chatham straits, and was a total loss, and that certain members of the crew lost their lives, and that certain suits in personam in admiralty had been filed in the court wherein limitation was sought, by the personal representatives of the deceased seamen to recover damages, and it was alleged that these claims exceeded the value of the interest of the owner and charterer in the tender, and that they desired to claim the benefits of the provisions of the Limitation of Liability Act, and to contest their liability, and the liability, if any, of the tender, and made the usual prayer for exoneration and limitation of liability.

Hazel Kruse, as administratrix of the estate of Ernest Kruse, deceased, Carl J. Hansen, as administrator of the estate of Andrew Lee, deceased, and of the estate of George Lee, deceased, drowned members of the crew, separately filed answers and claims to the petition. These personal representatives, on behalf of the widow and dependents, denied that the tender was seaworthy, and alleged that with the privity and knowledge of the owner and charterer, the O. M. ARNOLD was sent out to open sea, and by reason of the unseaworthy condition of the tender, and the negligence of the owner and charterer, and the negligent navigation of the tender, Kruse

and the Lees lost their lives, and they filed claims as widow and dependent relatives, through a personal representative appointed by the probate courts of Oregon, to recover damages for their wrongful deaths, under the provisions of the Jones amendment to the Seamen's Act, granting a right of action to recover damages for heirs and dependents as designated by the statute. These are the petitioners herein.

The owner and charterer filed Exceptions to the answers and claims on the grounds that the court wherein the limitation was filed has no jurisdiction over the personal representatives or their claims, and on the ground that they had no standing, right or qualification to appear in the proceedings or to make any claim.

Other exceptions were made as to the sufficiency of the claims to state a defense or constitute a claim, which are not deemed material to this appeal, and were not ruled on by the trial court.

This exception was submitted to the court on argument and brief, and the court rendered an opinion in which it was held:

"———

> In view of the established rule of this Court (The Princess Sophia, 35 F.2d, 736; petition for rehearing denied, 36 F.2d, 591; affirmed 61 F.2d, 339, at 354), petitioners' Exception I to the Answers and Claims of claimants will be sustained. This renders unnecessary a ruling upon the further exceptions.

An order may be settled upon notice or stipulation."

On the 4th day of August, 1941, notice was given to claimants' proctors that proctors for petitioners in limitation would present to the court for signature a Decree sustaining these exceptions, and a copy of the proposed Decree accompanied the notice. The form of Decree sustained the exceptions and dismissed the claims, with costs to petitioners.

Claimants filed objections to the form of Decree and requested that claimants be allowed within ten days the right to amend their claims by substituting an administrator or personal representative appointed by the courts of the State of Washington, in lieu of the administrator appointed by the courts of the State of Oregon, and also to strike out that portion of the decree providing that the claims be dismissed with costs to petitioners.

The court heard argument on the objections and over-ruled the same, and a final Decree dismissing the claims was entered on the 25th of August, 1941.

On October 3, 1941, an appeal was allowed, and the case proceeded to the Circuit Court of Appeals. The case was duly presented to the Court of Appeals and on the 22d day of April, 1942, that Court rendered a written opinion.

No finding was made in the opinion as to the right of the Oregon administrators to maintain the

claims on behalf of the dependents in the Limitation proceeding. The Court ruled as follows:

> "A form of decree was lodged in the court below, to which claimants objected on the ground that the order of dismissal should provide that the claimants might amend by substituting personal representatives appointed in Washington. The objections were over-ruled and the claims dismissed.
>
> "Claimants contend here that they should be entitled to properly present their claims, but they would be prevented from doing so because the order is res judicata. While it seems clear that the order would not prevent other parties from filing claims, (that is personal representatives appointed in Washington) we see no reason why the order appealed from could not state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington. The order is so modified, and as modified is affirmed."

On April 27, 1942, a letter was addressed to the clerk, Paul P. O'Brien, Esq., in which inquiry was made regarding the taxation of costs, and the further inquiry

> "The application to the District Court, refused by that court and allowed by the Court of Appeals, was to permit the claimants to amend their answers and claims filed in the limitation proceeding by substituting administrators to be appointed in the State of Washington. It is not clear in my mind from the last paragraph of the opinion whether the Court intended the claimants to file new claims, or to be permitted to substitute Washington administrators, as was done in Rejsenhoff v. Colonial

> Navigation Co., 35 F. Supp. 577; Dietel v. Gleason, 22 F. Supp. 355; also see 67 S. 68, and authorities cited on memorandum handed up on day of trial."

A reply to this letter was written by proctor for petitioners, in which he stated as follows:

> "The last paragraph in counsel's letter strikes us as a refusal to believe or understand the clear purport of the opinion filed. If the question of substitution to which counsel refers and cites cases, were to be thus re-argued, which we assume it is not, the cited cases would be found distinguished in the same manner as the other cases cited in appellants' Brief. None of them involve substitution of entirely different persons as parties to the action, and do not impair the rule of this Circuit in *The Princess Sophia*, 36 F.2d, 591, 61 F.2d, 339, cited at page 30 of appellees' brief."

Before the expiration of the time for filing a petition for rehearing, a motion was filed with the clerk, requesting extension of time within which to file such petition for a modification of opinion and judgment, and objection to the taxation of costs, and this was denied by the court. On May 22, 1942, a motion was filed to amend the decree and for retaxation of costs. This in effect was a petition for rehearing and was filed within the time fixed by Rule 25 of the Court.

A memorandum was filed in which it was called to the court's attention that the order of dismissal by the trial court acted as *res judicata*, and it was

argued that the Oregon administrators were in privity with the statutory beneficiaries, and it was pointed out that the Court should unqualifiedly direct that claimants be permitted to file amended claims by Washington administrators, either by substitution or new claims, and that the recital in the District Court's decree that the claims be dismissed be deleted; that the terms of this decree that forced an appeal because they were met with the objections that the time limit for filing the claims in the Limitation proceedings had expired on March 25, 1940, and that claimants would be met with the contention that the claims had already been adjudicated. Claimants then proceeded to argue the question of the taxation of costs, and there was a separate application to the trial court in respect to the terms of the mandate. It was requested that the mandate specifically follow the relief prayed for in claimants' objections and motion in respect to the form of decree of the District Court. It was prayed that claimants be permitted to file amended claims in the Limitation proceeding by substituting Washington administrators, and it was said that this was the purpose of the appeal, and furthermore, that the mandate should recite the affirmance of the District Court's decree without prejudice. The Court had before it the letter of April 27, 1942, and the letter of proctors for petitioners dated April 29, 1942, as well as the supplemental brief citing Dietel v. Gleason, 22 F. Supp. 355 at 357, where it was held under the same contention,

> "The motion to dismiss for lack of capacity to sue will be granted, with leave to the plaintiff to serve an amended complaint or to commence a new suit in case she shall take out ancillary letters of administration here."

and Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 377. 579, where the same contention was made and sustained regarding actions by foreign administrators under the Jones Act,

> "We will dismiss the complaint as it stands with leave to amend within thirty days. Within that time plaintiff may discover facts that will permit an allegation that plaintiff's intestate suffered his fatal injury in New York. Otherwise, she may equip herself with ancillary letters and allege that fact. Plaintiff's qualification for ancillary administration here will work no change in the cause of action and the statute of limitations will not apply. Rule 15 (c). (citing cases)"

Petitioners filed a memorandum in which, among other things, it was stated as follows:

> "The modification made of the lower court's decree is one of form only. It neither adds to nor detracts from the decree entered below, as respects any substantial right. Appellants are the only ones who have made any suggestion that the decree entered below would operate as res judicata or with prejudice to the filing of claims by any parties other than the Oregon personal representatives who are disqualified by the decree. It was never supposed, suggested, or contended by appellees that the decree below would have such effect. - - - - We submit that the objections filed by appellants below

to the form of decree did not raise any question or opposition to the effect that the decree would operate with prejudice or as res judicata. If they had done so, or if appellants had requested below that the words 'without prejudice' be added to the decree, such modification would have been granted without opposition or question, for, in our opinion, such modification does not alter the effect of the decree in any way.

"The opinion filed by this Honorable Circuit Court, in our opinion, leaves appellants in exactly the same position they were in before the appeal was taken."

The Court took the matter under advisement but on June 2, 1942, denied the motion to modify the decree, and also denied the objections to taxation of costs.

It is our contention that these motions were in point of fact applications for rehearing and reconsideration of the appeal, and the Court having taken the matter under consideration, passed upon the applications, and the time for taking an appeal under Title 28, Section 250 of the Judicial Code would not commence to run until the 4th of June, 1942, and therefore this appeal is within time.

JURISDICTION

The decree was entered in the United States District Court for the Western District of Washington, Northern Division, on the 25th day of August, 1941, dismissing the claims. The appeal to the United States Circuit Court of Appeals for the Ninth Cir-

cuit was perfected on the 17th day of November, 1941. The opinion (127 F.2d, 648) was entered on the 22d day of April, 1942. Letters to the clerk of the Court of Appeals in relation to the form of the mandate of that Court filed by the claimants about April 29th, and answers thereto were filed by petitioners on or about the first of May. On May 22d claimants filed a motion with the Court which in form amounted to an application for rehearing and reconsideration of the order of April 22, 1942, as previously referred to, which was denied by the Court on June 2d. This was in time under Rule 25. The time for filing petition for certiorari will expire on September 2d, 1942, if the time is computed from denial of the motions on June 2d.

The jurisdiction of this Court is invoked under Title 28, Sections 347, 350, U.S.C.A.

QUESTIONS PRESENTED

I.

Whether a personal representative of a deceased seaman appointed by the probate courts of the State of Oregon could deny the right to limit and maintain a claim for the wrongful death under the Jones Act in a Limitation of Liability proceeding filed in the State of Washington, without the appointment of a personal representative by the probate court of the State of Washington.

II.

Whether the court should have directed, on claimants' application being made therefor, that an amendment be made to the claims permitting the claimants to substitute personal representatives appointed by the probate courts of the State of Washington in the limitation proceedings.

III.

Whether the United States Circuit Court of Appeals did not err in not specifically directing the District Court to permit claimants to substitute Washington administrators in lieu of the Oregon administrators in the claims that had already been filed, and that the claims of the Oregon administrators should not be dismissed, and that the particular relief prayed for upon objection to the form of decree in the District Court should be allowed.

IV.

The time for the filing of claims in the Limitation proceeding having expired, if new claims were ordered to be filed, whether the claims should not be filed *nunc pro tunc* as of the date of the expiration of the time for filing claims, namely, March 25, 1940.

V.

Whether the Court of Appeals in any event did not err in respect to the taxation of costs against the claimants.

VI.

Whether penalty for co-ercing appeal on insub-

stantial question should not have been imposed in Circuit Court of Appeals and this Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

Importance to the Claimants

The claims having been filed in time, the action of the District Court in entering a dismissal of the claims acted as res judicata as to any right to file a claim subsequently on behalf of the dependent heirs by Washington administrators, because these dependent heirs were in privity with any administrator appointed in the State of Washington and necessitated an appeal. See Chicago etc. R. Co. v. Schendel, 270 U.S. 611. The form of the decree, therefore, was fatal, and the refusal of the trial court to permit a revision of the decree so as to enable claimants to effect the substitution as applied for, was capricious, particularly in view of the diversity of opinion as to the right of a foreign administrator under the Jones Act, and the Railway Employers' Liability Act, to maintain an action in another jurisdiction without the appointment of an ancillary or local administrator.

This refusal amounted to an outlawing of the claimants' claims in the Limitation proceeding. This was particularly arbitrary in view of the established precedents in other jurisdictions namely:

Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 577; Dietel v. Gleason, 22 F. Supp. 355. These matters were fully presented to the Court of Appeals, both by memorandum and by argument and citation of authorities. The Court of Appeals, instead of passing on the right of Oregon administrators to maintain the claims in the courts of Washington, failed to rule directly on the question, but made the observation that it did not see how the claims of dependents could be *res judicata* if they were subsequently filed by Washington administrators, thereby in effect confirming the ruling of the court on this point. This, as shown by the Schendel case, supra, was clearly error. An appeal having been forced on claimants, the Circuit Court of Appeals should have made specific provision that the District Court should in any event allow the substitution of Washington administrators as prayed for. It is apparent that this application for substitution in the District Court was made solely for the purpose of removing the controverted question of the right of the Oregon administrators to maintain claims in the Limitation proceeding filed in the State of Washington, and the Court should have held that no ruling would be made upon this question, but claimants should be permitted to make the substitution. The effect of the Court's ruling was to leave undecided the matter as to whether or not the claims of the beneficiaries of deceased seamen should be permitted to be filed out of time or as late claims or

by way of substitution. Their rights to maintain their claims in Limitation should not thus be permitted to rest in the discretion of a District Judge, because their rights were already consummate by the claims already filed in the Limtitation proceedings by Oregon administrators.

II.

Conflict of Decisions Requires Clarification By This Court

Actions for wrongful death of seamen during the course of their employment are exclusively for the benefit of statutory heirs. The Federal Employer's Liability Act, (45 U.S.C.A. 51), Lindgren v. U.S., 281 U.S. 45; Southern R. Co. v. Stewart, 115 F.2d, 521; Jones Act, 46 U.S.C.A. Sec. 688. The creditors have no interest in any recovery made, and the plaintiff, in cases brought under these statutes, is merely a trustee. Many Federal and state courts have held that the principle of law that a non-resident personal representative cannot maintain an action in a foreign jurisdiction, does not apply.

In fact, a review by this Court was sought on this very point in the Mississippi case of Gulf M. & N. R. Co. v. Wood, 289 U.S. 759. The case was brought in Mississippi under the Federal Employer's Liability Act by a Tennessee administratrix, without ancillary letters being taken out, and the state court held that the Tennessee administratrix could maintain the action in Mississippi. It was held that

the Federal statute had created the personal representative as a statutory agent or trustee, not of the estate of the decedent, but of those entitled to participate in the benefits of the recovery.

There are a number of Federal and state decisions and texts that sustain this rule: Stumberg, Principles of Conflict of Laws, 176; Goodrich, Conflict of Laws, 213; 31 Harvard Law Review, 1161; 16 American Jurisprudence, pp. 184, 185; Pan Two, 26 F. Supp. 990; Gulf M. & N. R. Co. v. Wood, 146 S. 298, (cert. denied 289 U.S. 759); Kirincich v. Standard D. Co., 27 F. Supp. 219; Pearson v. Norfolk etc. R. Co., 286 F. 429; Rose v. Phillips Packing Co., 21 F. Supp. 485; DeMattei v. Missouri etc. R. Co., 139 S.W.2d, 504; Wells v. Davis, 261 S.W. 58; Shaw v. Chicago etc. R. Co., 282 S.W. 416.

Opposed to this view there are a number of state and Federal decisions and texts. See Beal, Conflict of Law, Vol. II Sec. 396.1, pages 1313, 1315; Brooks v. S. P. Co., 148 F. 986; Brown v. Boston & M.R.R. Co., 283 Mass. 192, 186 N.E. 59; Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 577; Dietel v. Gleason, 22 F. Supp. 355.

These authorities are in irreconcilable conflict. The conflict cannot be explained or reconciled by the edicts of text writers and some judges that there is no conflict but in jurisdictions in which foreign administrators have been permitted to sue without securing ancillary administrators, there has been a

permissive statute. Such declarations are not borne out by the decisions. Their authority to maintain the suit is not derived from any state law, but is a Federal statutory right and power given to carry out the policy of a Federal statute. Ancillary letters are not necessary because the right of action given is not an asset of the estate and that is the purpose of ancillary proceedings. It is said the failure to distinguish between the special character of the personal representative as a trustee in these classes of cases and the ordinary common-law functions of an administrator has caused a diversity of judicial opinion with respect to the right of a foreign administrator to maintain the suit. However, the cases and judicial utterances are in hopeless conflict and it is therefore important that this question be finally decided. The denial of certiorari in the Wood case, supra, cannot be said to be an expression of opinion by this Court.

It is not to be lost sight of that the question was directly raised in Southern R. Co. v. Painter, 86 L. Ed. 123; and this Court proceeded to decide that case on the merits without reference to the question.

III.

Arbitrariness of Taxation of Costs

The question of costs taxed in Limitation proceedings against claimants by the Court of Appeals is so at variance with such established precedents as The Strathleven, 213 F. 979; The Edw. S. Mur-

ray, 278 F. 895, 900, that a decision should be rendered which will be a guiding principle for courts of appeals regarding the taxation of costs in admiralty in limitation proceedings. The taxation of costs here was so arbitrary and oppressive that this alone would warrant a review by this court. Furthermore, whether the projecting of an insubstantial question as to a proper party and an offer to correct it does not require the imposition of a penalty.

IV.
Jurisdiction

Whether the several applications to the Court regarding terms of the decree, the rulings by the Court thereon amount to a reconsideration of the case by a rehearing is within the rule of Bowen v. Loperena, 311 U.S. 262, is one of importance, justifying assumption of jurisdiction by this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for this review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9977, In the matter of the Petition of New England Fish Company of Oregon, a corporation, owner, and New England Fish Company, a corporation, chart-

erer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability, and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

WM. P. LORD
JAMES W. MIFFLIN
BEN ANDERSON
Proctors for Petitioners herein.

IN THE SUPREME COURT
of the United States

TERM, 365

IN THE MATTER OF THE PETITION OF NEW ENGLAND FISH CO. OF OREGON, a corporation, owner, and NEW ENGLAND FISH COMPANY, a corporation, charterer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability.	CLAIM OF HAZEL KRUSE and CARL J. HANSEN, Personal Representatives of dependents of deceased seaman, to recover damages for their wrongful death.

BRIEF ON PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
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IN THE MATTER OF THE PETITION OF NEW ENGLAND FISH CO. OF OREGON, a corporation, owner, and NEW ENGLAND FISH COMPANY, a corporation, charterer, of the American Diesel Fishing Tender O. M. ARNOLD, for limitation of liability.	CLAIM OF HAZEL KRUSE and CARL J. HANSEN, Personal Representatives of dependents of deceased seamen, to recover damages for their wrongful death.

BRIEF ON PETITION FOR WRIT OF CERTIORARI

I.
THE OPINIONS OF COURTS BELOW

The opinion of the U. S. District Court for the District of Washington, Northern Division, has not been reported. It appears on page 3 of the Petition for Certiorari; the opinion of the U. S. Court of Appeals is printed in the Transcript, on page 5 of the Petition and in 127 F. (2d) 648.

II.
JURISDICTION

The date of the decree of the U. S. Circuit Court of Appeals for the Ninth Circuit is April 22, 1942.

Letters addressed to the clerk regarding terms of the decree of the Court of Appeals, dated April 29, 1942; Motion for reconsideration of decree of Court of Appeals and mandate filed May 22, 1942; Order of court denying same entered June 2, 1922; Petition for Writ of Certiorari filed by clerk of the United States Supreme Court on August 21, 1942.

Jurisdiction of this Court is invoked under Sections 347, 350, Ttitle 28, U.S.C.A. and Bowen v. Loperena, 311 U.S. 262.

III.
STATEMENT OF THE CASE

This has already been set forth in the Petition, pages 1 to 9, and a supplemental statement is added under the title Statement.

IV.
SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that an administrator suing under the Jones Act to recover damages for wrongful death, could not maintain such claim by the Oregon representatives in Limitation of Liability proceedings filed in the State of Washington.

2. Said Court erred in failing to direct by its mandate that the District Court of Washington permit a substitution of a Washington administrator for an Oregon administrator in the pending claims in the Limitation of Liability proceedings.

3. The Court erred in not holding that under the practice prevailing in Washington, the Oregon personal representatives were trustees and had a right to maintain the claims without ancillary proceedings.

4. The court should not have taxed costs against these petitioners in the Circuit Court of Appeals.

V.
SUMMARY OF ARGUMENT

Point I. A personal representative under the Jones Act, being a trustee to distribute the fund to statutory beneficiaries, the rule against such representative suing in a foreign jurisdiction does not apply.

Point II. Washington courts recognize the right of foreign personal representatives to sue in their courts when trustee relationship exists, and this rule should have been applied.

Point III. If the court was in doubt upon right of these Oregon administrators to maintain their claims in Limitation of Liability proceedings pending in the U. S. District Court of Washington, the Court of Appeals should have directed that a sub-

situation or amended answers and claims be filed as prayed for by Oregon administrators in the trial court.

Point IV. Taxation of Costs in the Court of Appeals was inequitable.

Point V. Conclusion

STATEMENT

Ernest Kruse, George Lee and Andrew Lee were engaged in brailing in Alaskan waters on a cannery tender named M/S Arnold, as employees of the New England Fish Company. They and other employees were employed to navigate the boat around certain fishing grounds and load it with fish taken from set-nets and bring cargo to the cannery. Suffice it to say that through claimed negligence, unseaworthiness with privity, the cannery tender was swamped and the above-named parties lost their lives.

Kruse was the cook on the tender, and it is charged that he left surviving him his widow Hazel Kruse and three minor children; that Andrew Lee was an employee on the tender, carrying no license,

and left surviving him a daughter, Marcella, aged 17, suffering from arrested development, whom he was supporting, and that George Lee was the "skipper" and his only license was that of a motorboat operator, and that he was Marcella's brother and was contributing to her support.

ARGUMENT

Point I.

A personal representative under the Jones Act, being a trustee to distribute the fund to statutory beneficiaries, the rule against such representative suing in a foreign jurisdiction does not apply.

(a) The deceased were seamen within the Merchant Marine Act.

Federal Employers' Liability Act, 45 U.S.C.A. 51.

Merchant Marine Act of 1920, U.S.C.A. 688.

Domenico v. Alaska Packers Assn., 112 F. 554.

Ahlquist v. Alaska Packers Assn., 39 F. (2d) 348.

Sandanger v. Carlile Packing Co., 259 U.S. 255.

(b) Actions for wrongful death of seamen during the course of employment are exclusively for the benefit of statutory heirs.

Federal Employers' Liability Act, 45 U.S.C.A. 51.

Lindgren v. U. S., 281 U.S. 45, 74 L. Ed. 692.

Southern R. Co. v. Stewart, 115 F. (2d) 321.

These men were seamen and their rights and liabilities are fixed by the maritime law. This was established, as far as fishing in Alaska waters was involved, as early as *Domenico v. Alaska Packers Assn.*, 112 F. 554, and likewise by *Ahlquist v. Alaska Packers Assn.*, 39 F. (2d) 348, and *Sandanger v. Carlile Packing Co.*, 259 U.S. 255, where fishermen's contracts were held to be of maritime nature.

The Jones Act (1920) is an amendment to the Seamen's Act, and is sometimes referred to as the Merchant Marine Act of 1920 (46 U.S.C.A., Sec. 688). After enlarging seamen's rights of action for damages on account of negligence, it further provides that in case of death of any seaman as result of accidental injuries, "the personal representative of such seamen may maintain an action for damages at law . . . and in such action all statutes of the United States covering or regulating the right of action for death in cases of railway employees shall be applicable. . . ."

The claims made in the limitation proceedings are under this 1920 Act for wrongful death. The statute refers to the Employers' Liability Act (45 U.S.C.A., Sec. 51 et seq.) and incorporates that Act and all rights to recover damages for wrongful death. The Employers' Liability Act grants a right of action for the benefit of the surviving widow or husband and children of such employees, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death.

The cause of action here granted for wrongful death is not for the benefit of the estates of the deceased where creditors may participate in the recovery, but it is a cause of action granted for the benefit of certain named dependents, and if these statutory heirs are non-existent, the cause of action dies. The creditors have no interest or right in any recovery that is made.

As was said in *Lindgren v. U. S.*, 281 U.S. 45, 74 L. Ed. at 692:

> ". . . since Congress by the Federal Employers' Liability Act took possession of the field of the employers' liability to employees in interstate transportation by rail, all state laws on the subject are superseded."

and again, at 693:

> ". . . it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.
>
> "It results that in the present case no resort can be had to the Virginia death statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that act."

What we are concerned with is purely a question arising solely under Federal law, and not rights accruing under any state law. In other words, the owners of the M/S O. M. ARNOLD have filed a petition for the limitation of and exoneration from liability, in which they allege that an Oregon corporation is

the owner of the lost vessel. They allege their right to file the petition because claims are pending against them. These claims are all claims for wrongful death accruing to the heirs residing in the State of Oregon, but the laws of no state have any bearing on the question. Every right and every claim of right, every procedural question and every rule of evidence is a Federal rule. So we come to the question propounded.

A personal representative may sue in a foreign jurisdiction for the benefit of statutory heirs under the Jones Act. An ancillary administration is not necessary.

Stumberg, Principles of Conflict of Laws, 176.

Goodrich, Conflict of Laws, p. 213.

31 Harvard Law Review, p. 1161.

16 American Jurisprudence, pp. 184, 185.

Pan Two, 26 F. Sup. 990, 1939 AMC 501.

Gulf M. & N. R. Co. v. Wood, 164 Miss. 765, 146 S. 298; (cert. denied 289 U.S. 759, 77 L. Ed. 1502).

Kirincich v. Standard D. Co., 27 F. Supp. 219.

Pearson v. Norfolk Etc. R. Co., 286 F. 429.

Rose v. Phillips Packing Co., 21 F. Sup. 485.

DeMattei v. Missouri etc. R. Co., 139 S.W. (2d) 504.

Wells v. Davis, 303 Mo. 388; 261 S.W. 58.

Shaw v. Chicago etc. R. Co., 314 Mo. 123, 282 S.W. 416.

CONTRA:

Beal, Conflict of Law, Vol. II, Sec. 396.1, pp. 1313, 1315.

Brooks v. S. P. Co., 148 F. 986.

Brown v. Boston & M. R. R. Co., 283 Mass. 192, 186 N.E. 59.

Rejsenhoff v. Colonial Navigation Co., 35 F. Supp. 577.

Dietel v. Gleason, 22 F. Supp. 355.

Stumberg in his work *Principles of Conflict of Laws*, page 176, sums up this rule as follows:

> "There is a fundamental difference between suit by an administrator as representative of an estate, and an action for wrongful death. In actions for wrongful death he is suing not to recover an asset of the estate which is subject to the claims of local creditors, but as a statutory trustee to recover a sum for the benefit of certain named beneficiaries who alone have a legal interest. Since these beneficiaries are ultimately entitled to the fund, recovered, no harm can be done by permitting any administrator to sue in any state where the defendant can be served with process. Such a practice might avoid considerable useless expense and annoyance."

In some states there is an express statutory prohibition against a foreign personal representative maintaining an action, and in other states the right to maintain such action upon the filing of a certified copy of the appointment is recognized. *See Kirincich v. Standard D. Co.*, 27 F. Supp. 219 (Reversed on other grounds, 112 F. (2d) 163).

But such statutory restrictions have been held not to apply where the administrator is suing for the benefit of surviving heirs, under the Federal Employers' Liability Act.

> Wells v. Davis, 303 Mo. 388; 261 S.W. 58.
>
> Shaw v. Chicago etc. R. Co., 314 Mo. 123, 282 S.W. 416.

The Federal courts have sanctioned foreign administrators bringing suits in other jurisdictions to recover for wrongful death. For instance, in *Pearson v. Norfolk etc. R. Co.* (1923) 286 F. 429, one Pearson, an employee, was killed in West Virginia. An administrator alleged to be a citizen of North Carolina brought action against the employer, a Virginia corporation, in the U. S. District Court of Virginia, without taking out an administration on Pearson's estate in Virginia. The court comments that there is no statute giving a foreign representative the right to sue in Virginia, and the rule that a foreign representative may not sue in the courts of Virginia to recover assets of this decedent's estate for administration remains in full force. The court says:

> "However, I can think of no reason why this rule should apply to the case at bar. The only even passably good reason for the rule is the protection of possible local creditors of a decedent."

The court goes on then and considers the reasons for this rule and holds that it cannot apply in

a case where the recovery for wrongful death goes to statutory beneficiaries. The court says:

> "The reason that the rule in question cannot possibly apply here is that, by the express terms of the West Virginia wrongful death statute, no creditor of the deceased as such has the slightest interest in or right to the recovery sought by the plaintiff at bar. The foreign administrator here sues to recover a fund which is not to be administered, but is merely to be distributed. When the reason for a rule fails, the rule ceases to apply. And it follows that there is no reason to be found in the policy of the law of Virginia why the plaintiff here may not maintain this action."
>
> * * * * *
>
> "There are many decisions which support the conclusion which I reach, but which are based on the theory that the foreign representative is permitted to sue because he is a 'statutory trustee' (17 Corpus Juris, p. 1266, No. 117, notes 28 and 29); or because the foreign grant of letters merely 'serves to designate the person who may sue.' (McCarty v. New York etc. Co. (CC) 62 Fed. 437, 438). I find it unnecessary to quarrel with the reasoning of these cases. But it seems to me simpler and rather more satisfactory to say that the foreign administrator here may sue because there is no reason for denying him such right. . . .
>
> "It is argued that 'foreign letters have no extra-territorial effect.' This, with deference, seems to me to be an incomplete, and therefore a misleading statement of a sound rule. The meaning of the rule is merely that the local courts will not give such effect to a foreign grant of letters as to permit local assets of a decedent to be administered according to a foreign representative to have a recovery which is not to be administered at all is not giving

> extra-territorial effect to the plaintiff's letters within the meaning of the rule in question. A rule designed only to prevent foreign administration of local assets of a decedent can not properly be applied to assets of living people which are not to be administered at all."

Again, in *Rose v. Phillips Packing Co.*, 21 F. Sup. 485, one Nola Rose, administratrix of the estate of her deceased infant son, brought action against the packing company, and predicated jurisdiction in the U. S. Courts on diversity. The action was brought in the U. S. District Court of Maryland by a Virginia administratrix, and the defendant was a Maryland corporation. The complaint was demurred to on the ground that the suit in Maryland may not be maintained by a foreign administrator. Judge Chesnut held, at page 488:

> "It is indeed a very general rule that a personal representative appointed in one state is without authority to maintain a suit in another state. An underlying reason for this rule is to protect local creditors; but the rule should have no proper application to a case where the personal representative really sues in the capacity of a trustee for dependents or a preferred class of relatives as in the present case. . . . ."

Pan Two, 26 F. Sup. 990, 1939 AMC 501 was a libel in admiralty, brought by the administrator of a deceased seaman to recover damages for his wrongful death. It was alleged in the libel that one Melvin was employed as a deckhand on the tug Pan Two, owned by the respondent, and that he was drowned in the State of Louisiana when the tug sank as

result of negligent navigation. The respondent had a substantial place of business in Balitmore city, and a libel in personam was filed there under the Jones Act. The administrator was appointed by a probate court of Ohio, and there was no probate of the estate in Maryland, or proceedings in any court of Maryland to administer upon the estate. The case is very carefully considered and seems to involve the precise question presented here. The court states the question thus:

> "The respondent's legal objection to the maintenance of the suit by the Ohio administrator is put on the familiar principle that ordinarily an executor or administrator has no extra-territorial powers beyond the State where he is appointed, and therefore may not maintain suits in the Courts of other States or of the United States outside of that jurisdiction. Johnson v. Powers, 139 U.S. 156; Wright v. Gilbert 51 Md. 152."

and continues:

> "This general principle of the common law has, I think, no proper application to the particular case because the administrator is here suing not as a common law administrator for the purpose of collecting and distributing assets of the decedent, but in the capacity of a trustee for a preferred class of relatives. So much was in effect said by the Supreme Court in Lindgren v. U. S., 281 U.S. 38, 41, 1930 A.M.C. 399, affirming the decision of the Fourth Circuit, 1928 A.M.C. 1752, 27 F. (2d) 725:

In conclusion, the court said:

> "In giving the right of action to the personal representative without further description, Congress evidently intended to confer the right

> upon the lawfully and properly appointed executor and administrator of the decedent. Briggs v. Walker, 171 U.S. 466; but for the purpose of the suit he must be regarded as a trustee rather than as an executor or administrator. Although the title to the recovery is vested in him, he is not the real beneficiary of the suit but in this respect merely a nominal party holding title for the benefit of the decedent's dependents as prescribed by the statute. His authority to maintain the suit does not derive from laws of the State of his appointment as an executor or administrator but is a Federal statutory right and power given to carry out the policy of the Federal statutes. In this respect, therefore, the extent of his authority is not limited to the confines of the State where he was appointed but is co-extensive with general Federal jurisdiction, subject of course to the applicable Act of Congress as to the proper venue. . . . ."

There are several state decisions upholding the right of an administrator suing for the benefit of statutory heirs to maintain an action in another jurisdiction under the Federal Railway Employers' Liability Act. The Mississippi Supreme Court came to this conclusion without resort to another precedent than the *Lindgren* case *infra*. A certiorari was taken to this Court on this point, and Writ was denied, (*Gulf M. & N. R. Co. v. Wood*, 289 U.S. 759, 77 L.Ed.1502). Says the Supreme Court of Mississippi in this case, (164 Miss. 765, 146 So. 298):

> "Appellant railroad company has raised a point in this case that has given us far more trouble than any of the matters above mentioned; and that point is, that although the suit was brought by and in the name of the adminis-

tratrix, and although it is admitted that the administratrix was duly and legally appointed by the proper court of Madison county, Tennessee, yet it was objected by appellant and admitted by the administratrix that she had taken out no ancillary letters of administration in this state, nor had she filed the certified copy of her foreign appointment as required by section 1723, Code 1930."

* * * * *

". . . . We are of the opinion that when the plaintiff has shown, as was shown in the case, that he has been actually and legally designated as the statutory trustee by a lawful appointment as the personal representative in the state, and in and by the court of that state, having competent jurisdiction to make the appointment, then the person so appointed may sue in this state under the Federal Employers' Liability Act, and that ancillary letters or a compliance with section 1723, Code 1930, is not necessary in such a case."

This case is cited in *Pan Two*, infra, but the fact that a review was denied by the Court was not noted. Cert. denied 289 U.S. 759.

There are a number of decisions sustaining the right of a non-resident administrator to sue on behalf of the statutory heirs. The case of *DeMattei v. Missouri etc. R. Co.*, 345 Mo. 1136, 139 S.W. (2d) 504, which recites a number of authorities not referred to in *Pan Two* (26 F. Sup. 990, already cited). This case directly holds that an administrator, where he sues for the benefit of an heir or class of heirs, may maintain a suit to recover for wrongful death outside of the jurisdiction of the state where the ap-

pointment was made and without any ancillary proceedings. The court cites texts to which we have not referred and which hold that the great majority of cases sustain this right.

Claimants did not file their claims in the limitation proceedings in the Federal District Court in the State of Washington by virtue of their inherent right as the representative of the estates of the deceased seamen, but by virtue of designation by the Federal statute as trustees for designated dependent survivors of the decedents, and for them alone.

> Chicago, B. & Q. R. Co. v. Wells-Dickey Co., 275 U.S. 161, 163; 72 L. Ed. 216.
>
> Lindgren v. U. S., 281 U.S. 38, 74 L. Ed. 686.
>
> Reading Co. v. Koons, 271 U.S. 58; 70 L. Ed. 835.
>
> Gulf, C. & S. F. R. Co. v. McGinnis, 228 U.S. 173, 175-176; 57 L. Ed. 785.
>
> Southern R. Co. v. Stewart, (8th Cir.) 115 F. (2d) 317, 321.

Any recovery by them in such action does not become a part of the assets of the deceased's estate, is not subject to deceased's debts, and is not to be distributed under any statutes of descents and distributions (authorities just above cited; Taylor v. Taylor, 232 U.S. 363, 58 L. Ed. 638). By reason of these facts it has been clearly and unequivocally held that an administrator or executor may bring and maintain an action under the Federal Employers' Liability Act in any of the courts given jurisdiction over

such actions by section 6 of the act, even though such courts be outside the jurisdiction from which they derived their appointment as such administratrix or administrators. (Gulf, M. & N. R. Co. v. Wood, 16 4Miss. 765, 776-778, 146 S. 298, certiorari denied, 289 U.S. 759, 77 L. Ed. 1502; Wells v. Davis, 303 Mo. 388, 397-405, 261 S.W. 58, 59-62. Compare, also, Dennick v. Central R. Co. of N. J., 103 U.S. 11, 26 L. Ed. 439.) (Excerpt from appellee's brief, Southern Railway Co. v. Painter, 86 L. Ed. 123.)

It is therefore established that the beneficiaries are the real parties in interest and that the administrator in an action for wrongful death is only a nominal party, and that he may maintain an action in a foreign jurisdiction to recover damages for the wrongful death of the deceased seaman for the dependant heirs without probating the estate in the foreign jurisdiction.

When the district court came to a contrary conclusion on what was termed a local practice, a decree was presented dismissing the claims. When this decree was presented the time for filing claims for the heirs in the Limitation proceedings had expired, but the right of action for wrongful death had not expired and would not for one year. No other claims had been filed in the Limitation proceedings. Counsel for claimants thereupon filed with the court objections to the form of decree presented, and moved the court to amend the decree by permitting a substitution of administrators to be appointed by

the Washington courts, and to strike out that portion of the proposed decree dismissing the claims with costs. The Court denied this application and entered a decree reciting "it is therefore further ordered, adjudged and decreed that the aforesaid claims and each of them be and they hereby are dismissed, with costs to the Petitioners."

The purpose of this application was of course to protect the claims of the beneficiaries as being filed within the time fixed in the order within which to file such claims, and to remove from the decree the element of an adjudication of the claims, or otherwise stated, the right of action of the claimants as far as the beneficiaries were concerned were adjudicated if the administrator was only a nominal party. Claimants now found themselves in a position where their claims were *res judicata,* and if not, then their claims were late in the limitation proceedings, and their right to file them in such proceedings were entirely discretionary with the court. There was nothing else for them to do but appeal, which was done.

It was pointed out to the Court of Appeals that under the ruling of the Schendel case (270 U.S. 611), the order dismissing the claims was clearly *res judicata,* and any further pressing of claims in the limitation proceedings would be an entirely independent claim, and the filing of the claim would be out of time and rest in the discretion of the court, and the terms of the decree gave rise to the defense of *res*

judicata and made that defense good. It was urged (1) that the court hold that the Oregon administrator could maintain the claims in the Washington limitation proceedings, or (2) in the alternative, direct that administrators be applied for in Washington, and that they be substituted when appointed, or (3) that the claims of the Washington administrators be filed *nunc pro tunc* as of the date fixed for filing in such order in the Limitation proceeding, (4) that the District Court should be peremptorily instructed to permit a substitution of the Oregon administrators; (5) if there was to be a dismissal it should be without prejudice to the right to file claims; (6) that costs, with a penalty, should be imposed for compelling an unnecessary appeal when the rights of the claimants could have been protected by an order as prayed for by claimants.

The Court of Appeals affirmed the decree with the observation:

> ". . . While it seems clear that the order would not prevent other parties from filing claims (that is personal representatives appointed in Washington). . . ."

and then proceeded to say "we see no reason why the order appealed from could not state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington."

Within the time fixed by Rule 25 of the Court of Appeals for filing for rehearing application was made that the decision or order of the Court of

Appeals should specifically provide for a substitution or make other provision fixing the rights of the claimants so their claims would not be out of time in the limitation proceedings.

The Court denied this motion, which placed the claimants' rights to maintain their claims wholly in the discretion of the trial court with a decree outstanding that the claims filed by the Oregon administrator as dismissed. In the Application of the Court of Appeals the decisions of Dietel and Rejsenhoff, supra, were called to the Court's attention, which cited Wulf and Birch cases as to the right of substitution. In the absence of a protective order the beneficiaries are placed in precarious position, and their rights are materially affected. That the beneficiaries had fixed their rights by pressing their claims by the Oregon admnistrators in theWashington Limitation proceeding and the phrasing of the Trial Court's decree of dismissal was a final decree and was *res judicata* in any subsequent proceeding by a Washington personal representative is clearly established by the ruling of this Court in Chicago etc. R. Co. v. Schendel, 270 U.S. 611, Balt., S. S. Co. v. Phillips, 274 U.S. 231 and State Court Decisions (Canfield v. Scripps, .. Cal. .., 59 Pac. (2d) 1040. In the Schendel case the widow of one Hope brought action to recover damages for his wrongful death under the Federal Employers' Liability Act in the State of Minnesota. The Railway shortly afterwards instituted proceedings under the Iowa Workmen's Compensation Act to establish the rights of the

parties under that Act. The widow was made a party. The proceedings went to judgment in a court of Iowa which became final. The Railway company in the Minnesota case then plead the Iowa court judgment as a bar. The Minnesota court rejected the plea on the ground that there was a lack of identity of parties since under the Iowa statute the right of recovery is in the beneficiary while under the Federal act the right is in the personal representative. In the Iowa proceedings it was determined that Hope was employed in intrastate commerce in the Minnesota action the court rejected the plea of *res judicata* of the Iowa judgment and held that Hope was engaged in interstate commerce and the causes of action were different. This Court held that the plea was good.

> "Hope's death as the result of negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the Federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident. In either case, the controlling question is precisely the same, namely, Was the deceased engaged in intrastate or interstate commerce? and the right to be enforced is precisely the same, namely, the right of the widow, as sole beneficiary, to be compensated in damages for her loss. The fact that the party impleaded, under the state law, was the widow, and, under the Federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as

> a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts. If a judgment in the Minnesota action in favor of the administrator had been first rendered, it does not admit of doubt that it would have been conclusive against the right of the widow to recover under the Iowa compensation law. And it follows, as a necessary corollary, that the Iowa judgment, being first, is equally conclusive against the administrator in the Minnesota action; for, if, in legal contemplation, there is identity of parties in the one situation, there must be like identity in the other."

It is very clear from these precedents that the Oregon administrators are trustees, rather than common-law administrators, and the decree of dismissal sustaining exceptions "decreed that the aforesaid claims and each of them be and they are hereby dismissed with costs to the petitioners," and that an adjudication was made on the merits of the claim and the ruling became res judicata on any further claims, if the dependents would be permitted to *file* any further claims.

Point II.

Washington courts recognize the right of foreign personal representatives to sue in their courts when trustee relationship exists, and this rule should have been applied.

The trial court found that the right of a foreign administrator in the Washington limitation proceed-

ings was governed by what was termed an established rule of the Court. (The Princess Sophia, 35 F. (2d) 736). In the Princess Sophia case any cause of action for wrongful death was under a territorial statute which vested part of the recovery in the heir and part of the recovery in the administrator for the benefit of creditors of the deceased, and many of the claims had expired at the time the application was made. Consequenly there was no basis upon which to allow the claims to be filed. The application to the trial court was to permit the filing of claims of Alaska administrators *nunc pro tunc* when the very cause of action on the claims had completely outlawed, or to file a substitution after the time limit for maintaining the claims had expired. The Court of Appeals in its opinion (61 F. (2d) 354), affirmed the refusal.

In this case the claims had not outlawed. Furtheremore, there was another very good reason why administrators appointed in Alaska for the purpose of maintaining an action for wrongful death should not be permitted in the Limitation proceeding filed in the U. S. District Court to make a substitution, and this was that under the Alaska death statute in force at the time (Oct. 24, 1918), being Sec. 1185 of the Alaska code, the recovery was divided between the heirs and the creditors. Under all of the authorities any recovery made was subject to debts of the deceased in the State of Washington, and there

was no administrator to protext such creditors, also other creditors in the limitation would be prejudiced. Here there are no other creditors. Furthermore, the claims for wrongful death were made under a state law. Here they are made under a federal law. The claims being made under a federal statute in an admiralty court, it would follow that the procedure outlined in federal decisions would control. The claimants were in court.

The purpose of an ancillary administration is to protect creditors, but in a claim such as is made by the dependents of these deceased seamen, no protection is necessary. See Duehay v. Acacia Mutual Life Ins. Co., 105 F. (2d) 768, at 771. Any recovery that the administrators made for these dependents could not be subjected to the claims of creditors. Ancillary proceedings were therefore unnecessary.

Proctor argued the right by these dependents to file a claim in the Limitation proceedings in the manner in which their appearance is made is a matter of local practice. He referred to Section 1457, Remington's Revised Statutes, and says that the statute "disqualifies non-residents of the State to act therein as administrators." He cites In re Gross's Estate, 73 Wash. 330, and In re Rowley's Estate, 178 Wash. 460, both of which are in harmony with the usual rule that personal representatives in one state have no authority to maintain action in another state, and he then cites Erie R. Co. v. Tompkins, 304 U.S. 84 and the Princess Sophia

as controlling the question of practice. But the Washington statute referred to, as well as the decisions, are concerned only with the maintenance of actions to recover debts by foreign administrator and unliquidated claims which are subject to be administered or are administered by the courts in Washington, and not to rights claimed under a federal statute.

The rule adopted in the Washington courts in regard to this matter is not quite so rigid and unyielding as proctor contends. In Doe v. Tenino Coal Co., 43 Wash. 523, 86 P. 988, it was contended that a California executor had no right to maintain an action in Washington to recover possession of personal property, but the court held that the plaintiff was a trustee under the will and therefore the rule did not apply, and here the Oregon administrators are trustees under all the decisions and if local practice is to control it would seem the Doe case should be followed. A more recent Washington decision affirms this rule.

This was subsequently confirmed when a Washington administratrix was appointed and application on behalf of the dependents was made to confirm the filing of claims by her in the Limitation proceedings, which was rejected by the District Court.

A Washington administratrix was appointed to file claims in the Limitation proceedings on July 21, 1942 on behalf of the dependents. A motion to quash

the filing of the claims was filed and the Court indicated that it would sustain the motion on the grounds that the claims were filed out of time, and on the grounds that the Court had lost jurisdiction of the claims. The Court thus interpreted the decision of the Court of Appeals to leave the District Court with a free hand to permit or reject the filing of claims in the Limitation proceedings on account of being out of time.

Point III.

If the court was in doubt upon right of these Oregon administrators to maintain their claims in Limitation of Liability proceedings pending in the U. S. District Court of Washington, the Court of Appeals should have directed that a substitution or amended answers and claims be filed as prayed for by Oregon administrators in the trial court.

The District and Circuit Court of Appeals should have allowed an amendment applied for substituting a Washington administrator in the pending claims.

Chap. 685, U.S.C. 1939, Pamphlet No. 10, pp. 1491-92.

Benedict on Admiralty, 6th Ed., Vol. 3, Sec. 539, p. 626.

Missouri etc. R. Co. v. Wulf, 226 U.S. 570.

U. S. v. Powell, 93 F. (2d) 788, 790, 791.

American R. Co. v. Birch, 224 U.S. 547.

Resjenhoff v. Colonial Nav. Co., 35 F. Supp. 577.

Dietel v. Gleason, 22 F. Supp. 355.

A proposed decree was served on proctors for claimants which was lodged with the clerk and notice given of the time and place of the signing and entering of the decree. Objections were filed (1) that the decree should be in the form of an order providing that the claimants have the right to amend by substituting an administrator appointed by the courts of Washington, and that they be allowed ten days time within which to secure the appointment of a Washington administrator, and it was further moved that the portion of the decree dismissing the claims with costs be stricken out from the proposed order. The matter was argued and the court overruled the objections and denied the request for substitution and amendment. Claimants now were in the position that their claims had been dismissed and they were out of time in the limitation of proceedings for filing their claims, and the denial of the right to substitute indicated that the court did not intend to permit the filing of claims by Washington administrators out of time. Claimants could place no other construction upon the rulings on argument or the objections.

The Court of Appeals sustained the trial court's order and made it obvious that it did not see how the ruling could be construed as *res judicata* as to Washington administrators, but modified the trial court's decree so that the order of the trial court

should provide that the dismissal was without prejudice to the filing of claims by representatives in Washington. It will be noticed that in claimant's letter of April 27th an inquiry was made as to whether the order of the Court of Appeals was to permit a substitution or the filing of new claims. This was referred to by counsel for petitioners in which it was contended that counsel refused to believe the clear purport of the opinion and the opinion recognized that to allow a substitution would be a substitution of new parties, etc.

The time for filing a petition for rehearing under Rule 25 of the Court of Appeals would expire on the 22nd day of May. On May 18th a motion was made to grant a few days extension, but on May 20th the Court denied the request. On May 22nd an objection to taxation of costs and a request was made that the mandate should provide for the filing of amended claims in the Limitation proceedings by substituting Washington administrators, and it was said, "This was the purpose of the appeal," with the further request that the affirmance is without prejudice. The petitioners in limitation filed a resistance memorandum in which it was argued that it was never suggested that the decree of the District Court would act as *res judicata*, and further recited the issues raised by the appeal and the effect thereof. The Court on June 2, 1942, denied the request to modify the decree of the Court of Appeals as well as the motion to retax costs.

That the trial court and the Court of Appeals should have directed that a substitution should be made is clear if the Oregon administrators in these claims are trustees and federal decisions permitting such substitutions are to be followed. In the Dietel and Rejsenhoff cases the court held that in cases brought by foreign administrators the complaints would be dismissed with a right to secure the appointment of an ancillary administrator with leave to amend the complaint by filing suit through a local or ancillary administrator. If a protective provision had been expressly made by the trial court as prayed for or Court of Appeals in respect to filing late claims, or by the process of disimissing the claims with the right to amend within a given time, this would have protected claimants in respect to filing their claims within the time fixed in the Limitation proceedings, but it was very clear,—at least it was to proctors for these petitioners,—that these claims were going to be outlawed if protective provisions were not made in the trial court's decree. It was thought that a suit brought under a federal statute which had been construed by this court to permit a substitution or a change of parties in cases where the real parties in interest were before the court as they were here, as the recitals in the claim will show, would be followed.

This Court has always evinced a willingness to permit substitution of parties where a case has not been brought by the proper parties, even though the statute of limitations has run. In other words,

where the case is brought for beneficiaries and the adminstrator is only a nominal party, then this Court has said that a substitution will be allowed. The leading case on the subject is Missouri etc. R. Co. v. Wulf, 226 U.S. 570. Construing this very statute in this case a mother sued in her individual capacity under the state law to recover for the death of her son, who was a railway employee. Under the Federal act she was compelled to maintain the action in a representative capacity. She had brought her action to recover for wrongful death within two years, but after the two years a substitution was made in which she brought suit as administratrix, and it was claimed that she could not maintain this suit because it had become barred, and the court was powerless to make the substitution. The Court said:

> "It is true that under the Federal statute the plaintiff could not, although a sole beneficiary, maintain the action except as personal representative. So it was held in American R. Co. v. Birch, 224 U.S. 547. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representative might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us,—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within No. 954, Rev. Stat. U. S. Comp. Stat. 1901, p. 696.

"Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by No. 6 of the employers' liability act. The change was in form rather than in substance (Stewart v. Baltimore & O. R. Co., 168 U.S. 445). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefrom it related back to the beginning of the suit. . . ."

The doctrine of the Wulf case has been repeatedly reaffirmed. For instance, in a soldier's War Risk Insurance case, suit had been brought within the time fixed but had been brought by the wrong parties, and an administrator was substituted after the limitation had run, and who was the only party entitled to maintain the suit. But the parties who had brought the suit were the statutory beneficiaries, just as the Kruses and the Lee girl are the beneficiaries in this proceeding. The Court permitted the amendment and discusses the claim at some length. Inasmuch as a good deal is said in the opinion which is applicable here, we take the liberty to quote from it (U. S. v. Powell, 93 F. (2d) 788, 790, 791).

"The attitude of the Supreme Court on the question of permitting amendments of this character was well stated in the recent case of U. S. v. Memphis Cotton Oil Co., 288 U.S. 62, 63, as follows: 'It has fixed the limits of amendment with increasing liberality. A change of the legal theory of the action, a departure from law to law, has at times been offered as a test. Union P. R. Co. v. Wyler, 158 U.S. 285, 295. Later decisions have made it clear that this test is no longer accepted as one of general validity. . . ."

Point IV.

Taxation of costs in the Court of Appeals was inequitable.

Costs

The taxation of costs in this case is oppressive in view of the fact that petitioners in limitation have not been put to any disadvantage. They opposed and resisted the motion to substitute in the trial court, and likewise they resisted the application to change the decree from a dismissal of the claims, which placed claimants in a very serious predicament. The court's decree does not recite that the case was dismissed for want of capacity to sue, but the claims are affirmatively dismissed. Likewise it seems the resistance to the proposed substitution was uncalled for. If the reservation was not there when new claims were filed it could be contended that such claims were not only res judicata but the court had already determined that the late claims would not be entertained. In the face of this situation, costs were taxed against the claimants.

Point V.

CONCLUSION

It is therefore respectfully submitted that not only on account of the importance to the petitioners herein that their rights be preserved, and also that this case is one calling for the exercise by this Court

of its supervisory powers in order that the question herein involved may be permanently settled by this Court, and that to such an end a Writ of Certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit, and the District Court, and enter a decree herein, either that the Oregon administrators were proper parties in the Limitation proceedings, or that petitioners' rights be conserved by permitting a substitution, as prayed for in the District Court and Court of Appeals.

Respectfully submitted,

BEN ANDERSON,
WM. P. LORD,
JAMES W. MIFFLIN,
Proctors for Petitioners herein.

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No. 365

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Supreme Court of the United States

OCTOBER TERM, 1942

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vs.

NEW ENGLAND FISH COMPANY OF OREGON, a Corporation, and NEW ENGLAND FISH COMPANY, a Corporation, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BOGLE, BOGLE & GATES and
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WHITTEMORE & TRUSCOTT and
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THE ARGUS PRESS, SEATTLE

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No. 365

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION OF LOWER COURT

The opinion of the Ninth Circuit Court of Appeals is reported in 127 F.(2d) 648 (Tr. 32).

COUNTER-STATEMENT OF THE CASE

This matter originates in the District Court of the Western District of Washington, Northern Division. Respondents' fishing tender, the O. M. ARNOLD, foundered in a gale in Chatham Straits, Alaska, on August 17, 1939. Libels in personam were filed in the Washington District Court by administrators ap-

pointed in Oregon for three crew members who lost their lives, seeking damages under the Jones Act. Petition for Limitation or Exoneration of liability was filed in the Washington District Court by Respondents. The Oregon administrators, being the Petitioners herein, filed their separate answers and claims in the limitation proceeding. Exceptions challenging, among other things, the capacity and rights of the foreign personal representatives and administrators to litigate the claims in the Washington District Court were filed by these Respondents, and after continuances over many months, submission of briefs, and arguments, these exceptions were sustained by the District Court, Bowen, Judge.

A decree of dismissal was lodged, and after further continuances, briefs, and arguments, the same was entered by the District Court. The Oregon administrators, petitioners herein, had filed objections to the decree on the ground that it should authorize the substitution of Washington administrators in the claims (Tr. 21). The objections did not suggest that the words "without prejudice" should be inserted in the decree. The objections were overruled, there not being then any Washington administrators or personal representatives appointed or in existence.

The Oregon administrators appealed to the Ninth Circuit Court of Appeals. No Washington administrators or personal representatives were appointed or in existence, nor was any application made for appointment of such, until some time after the matter had been heard and decided in the Circuit Court and after the mandate had gone down to the District

Court. The Circuit Court modified the decree "to state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington" and as so modified the decree was affirmed, with costs to the appellees (Tr. 32-33).

Thereafter appellants in the Circuit Court (petitioners herein) filed a letter (Tr. 34) commenting on the court's Opinion, and a motion to set aside Taxation of Costs and retax same in their favor (Tr. 38). The motions were denied without hearing or oral argument thereon (Tr. 43). Court Rule 25 of the Ninth Circuit provides for petitions for rehearing, but no such petition was filed within the allotted thirty days or at all.

SUMMARY OF ARGUMENT

I.

Application for certiorari is not timely made. Decree was entered below April 22, 1942, and subsequent letters and motions did not constitute a petition for rehearing so as to toll the three months period for making application for writ of certiorari.

II.

No valid reasons exist for review by writ of certiorari in this case. No conflict with other Circuits, or with applicable local decisions, or with decisions of this Court; no unsettled federal question involved and no departure from usual course of judicial proceedings. All Circuit Courts of Appeals which have passed on the question of capacity of foreign administrators have decided the question in accord with the decision below in the Ninth Circuit. There is a long line of

decisions by this Supreme Court determining the question, which the other courts have followed. Cases cited by petitioners from federal district courts in Maryland, New Jersey and Virginia distinguished, and in any event these are overruled by later decision on same question in Fourth Circuit Court of Appeals, whose jurisdiction embraces the Maryland and Virginia districts.

III.

Questions of substitution of parties and taxation of costs involve matters not of right, but of discretion in the lower courts; no abuse shown, but in fact these questions were decided in accord with prevailing rules, having regard to the circumstances of this case, and in accord with Ninth Circuit Rules of Court.

ARGUMENT

I.

PETITION FOR CERTIORARI NOT TIMELY

The act of February 13, 1925, Sec. 8 (28 U.S.C.A. Sec. 350) provides:

> "No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefore be duly made within three months after the entry of such judgment or decree * * *."

The opinion and decree of the Circuit Court of Appeals were filed and recorded April 22, 1942 (Tr. 31-33). April 27, 1942, Proctors for Appellant wrote a letter to the clerk of that court commenting upon the opinion (Tr. 34), to which Proctors for Appellees replied by letter dated April 29, 1942 (Tr. 35). Both parties to the appeal filed their respective bills of costs on May 4, 1942 (Tr. 36-37).

On May 20, 1942, Appellants filed a motion for extension of time in which to file petition for rehearing or modification of opinion and judgment, and objections to the taxing of costs (Tr. 37). Order denying that motion was entered by the Court May 20, 1942. On May 22, 1942, there was filed an instrument entitled "Appellant's Objections to Taxation of Costs" (Tr. 38). No request was made therein, or at any time, for a rehearing of the case on the merits, or for further argument, and no further hearing or argument was entertained in the cause.

On this petition for certiorari, petitioners claim that

their last mentioned objections to taxation of costs, filed in the Circuit Court of Appeals, was in effect a petition for rehearing, and as such suspended running of the time within which to seek certiorari. The motion was combined with a short argument and citation of authorities as to costs, but we call attention to the language of the motion itself (Tr. 38), and its prayer:

> "Wherefore appellants pray that taxation of the costs by the clerk in favor of the appellees be set aside and costs retaxed in favor of appellants.
>
> Wm. P. Lord,
>
> of Proctors for Appellants."

May 28, 1942, Appellees filed a memorandum in reply, on the question of taxation of costs only (Tr. 41).

On June 2, 1942, without hearing or oral argument, the Circuit Court of Appeals entered its order denying Appellants' motion (Tr. 43) referring to same as a motion "to amend decree and for retaxation of costs."

We believe it is quite clear that the Circuit Court did not regard or entertain Appellant's letter or motions as being a petition for rehearing of the merits, or for a change in the court's decision on the merits. The motion did not conform in substance, much less in form, to the requirements of the Ninth Circuit Court Rules. Rule 25 thereof provides for rehearings, thus:

> "A petition for rehearing may be presented within 30 days after judgment. It must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not

interposed for delay. Twenty printed copies must be filed with the clerk of this court."

Appellants filed merely a single typewritten copy of their motions, without any certificate. Motions for the retaxation of costs do not rise to the dignity or effect of a petition for rehearing. While the decree directed taxing of costs in favor of Appellees, the amount was not stated in or a part of the decree or judgment, and the taxing was merely a ministerial function of the clerk. Controversies thereover do not suspend or affect the judgment, nor go to the merits of the cause.

> "In any event, however, retaxation of costs does not alter the judgment as originally entered, and hence does not operate to postpone or extend the time for taking or perfecting an appeal from such judgment."
>
> 4 C.J.S. 901 (Sec. 440), citing among other cases:
>
> *Kearney v. Chicago, etc., R. Co.* (Minn.) 111 N.W. 923;
>
> *Wadhams v. Allen* (Ore.) 78 Pac. 362.

On this question, petitioners cite one case, *Bowman v. Loperena*, 311 U. S. 262. In that case a petition for rehearing was actually filed, but not timely. The lower court nevertheless granted the petition, and a rehearing was actually held on the merits. That decision adds nothing to and detracts nothing from the former rule that such a rehearing actually held *on the merits* does suspend the time for appeal.

In *Morse v. United States*, 270 U. S. 151, 46 S. Ct. 241, 70 L. ed. 518 (1926), Chief Justice Taft said:

> "There is no doubt under the decisions and

> practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a Court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition. (citing cases) The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the *due and seasonable* filing of the motion for a new trial or the petition for rehearing." (Italics ours)

In *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. ed. 557 (1937), this Court said:

> "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

In the latter case the appeal was held timely taken, because the lower court did entertain a rehearing on the merits, as the opinion thus further points out:

> "The original, the amended, and the supplemental petitions were considered upon the merits, and the court made findings and announced conclusions of the law with respect thereto."

We submit that the three-months' period in which certiorari might be applied for commenced to run May 22, 1942, when the decree was entered, and not June 2, 1942, when the motions were denied; and therefore

the time expired ~~August~~ July 22, 1942. The petition for certiorari herein was not filed until September 1, 1942.

II.

NO VALID REASON FOR REVIEW ON WRIT OF CERTIORARI EXISTS IN THIS CASE

Finding it difficult to form a synopsis of the petition for writ of certiorari herein and petitioners' brief thereon, we will be guided in this argument by Rule 38 of this Court, Subdivision 5(b), and consider whether any reasons exist of the character therein indicated, to call for review on writ of certiorari in this case.

A. No Conflict With Other Circuits

The two propositions decided by the District Court, from which appeal was taken to the Circuit Court of Appeals, and there affirmed, were as follows:

1. That foreign administrators lacked capacity and right to answer and contest the petition for limitation and to prosecute claims in the limitation proceedings in the District Court of Washington.
2. In therefore dismissing the answers and claims of the foreign administrators, the court would not order substitution of non-existent Washington administrators as claimants, no application having been made for appointment of such.

As shown by memorandum opinion filed by the District Court (Tr. 19) (not reported), the District Court in deciding these propositions followed the established rule of the Ninth Circuit laid down in *The*

Princess Sophia, 35 F.(2d) 736; rehearing denied 36 F.(2d) 591; affirmed 61 F.(2d) 339, at 354 (1932). The authority and reasoning upon which the Ninth Circuit rule was adopted in that case, will be found in the original District Court opinion (35 F.(2d) 736) and the opinion on rehearing in the District Court (36 F.(2d) 591), which were approved without much comment in the Circuit Court opinion (61 F.(2d) 339). The first of these opinions cited the rule of this Court (*Dennick v. R. R. Co.*, 103 U.S. 11, 26 L. ed. 439), and reasoned essentially as follows on the question of capacity:

> "To present a valid claim, the representative capacity must be established. Issuance of letters testamentary must be shown, and, if issued in another state, to have extra-territorial force, the right must be conferred by statute. The Washington statute confers no such right, and the State Court does not recognize the personal representative of a deceased person from another state."

And in the rehearing opinion the District Court, on the question of substitution, reasoned thus:

> "* * * but the court has not jurisdiction of the claimant until he appears and presents his claim. Equity in admiralty may not be administered until claimant appears and states the facts substantially as in a libel showing prima facie right of recovery."

Petitioners herein do not cite any Circuit Court of Appeals decision contrary to the Ninth Circuit rule which was followed in this case, and we submit that there are no contra decisions in any of the Circuit

Courts of Appeal. On the contrary, at least three other Circuits have announced the same rule as our Ninth Circuit.

The Fifth Circuit Court of Appeals in *Robinson v. First National Bank of Plainview*, 55 F.(2d) 209, held:

> "The rule is well settled that letters testamentary will not support a suit in another state in either a state or federal court, unless by force of some law of the forum."

The Sixth Circuit expressed it in *Maysville, Etc. Co. v. Marvin*, 59 Fed. 91, wherein the headnote reads:

> "An act giving the personal representative a right of action for the wrongful death of his deceased * * * will not be construed to confer such right upon a foreign administrator, contrary to the Common Law rule and the established policy of the state."

The Fourth Circuit Court of Appeals established the rule in 1940 after rejecting the views of two district courts in that Circuit which are here relied on by petitioners. *Ryholt v. Jarrett* (4 C.C.A.—1940) 112 F.(2d) 642 (discussed further *infra* p. 18).

A case in the Second Circuit, *Middleton v. Luckenbach* (2 C.C.A.—1934) 70 F.(2d) 326, was an admiralty proceeding in New York. Our question was not in issue there, because the personal representative had taken out ancillary letters in New York, but the fact is mentioned in the opinion, and we cite the case to show the custom in admiralty courts.

B. No Conflict With Local Decisions

In the State of Washington there is no statute authorizing a foreign administrator to sue in the state, nor any provision for his doing so upon filing certified copies of his letters, as some states provide. On the contrary, the Washington Statute positively disqualifies non-residents to act therein as administrators.

Rem. Rev. Stat., Sec. 1457.

The Washington courts enforce that statute, following the prevailing rule.

Barlow v. Coggan, 1 Wash. Ter. 257;

In re Goss' Estate, 73 Wash. 330, 132 Pac. 409;

In re Rowley's Estate, 178 Wash. 460, 35 P.(2d) 34.

In the latest case, last above cited, the Washington court said:

> "Foreign administrators and executors have no standing, as such, beyond the jurisdiction of the state in which they are appointed." (citing cases)

Petitioners challenge this statement of the Washington rule, citing *Doe v. Tenino Coal and Iron Co.*, 43 Wash. 523, 86 Pac. 938. We submit that this early case is in accord with the rule. The foreign administrator who was there allowed to sue in the state courts of Washington was not maintaining the suit in his capacity as administrator, but in the capacity of a special trustee under an express trust

created by a separate written instrument. This appears from the opinion:

> "It is urged first by appellant that respondent has no capacity to sue; that he is one of the executors of the will of said John S. Doe, deceased, holding under an appointment by the court of the state of California, and consequently without authority to maintain any action as such executor in this state. We think, however, that the written instrument signed by himself and Charles F. Doe and Eleanor H. Doe, hereinbefore referred to, by virtue of which he purchased this property, has the effect of constituting the respondent the trustee of an express trust within the contemplation of Bal. Code, Sec. 4825."

As such trustee of an express trust, the plaintiff there had specific authority from the Washington Statutes to sue in that capacity only.

C. No Conflict With Decisions of This Court

In 1806, Chief Justice Marshall held that foreign administrators lacked capacity, saying:

> "The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his own country. * * *
>
> "All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever

his rights may be, unless in conformity with the rules prescribed by the laws of that country."

Dixon's Executors v. Ramsay's Executors, 3 Cranch 319.

The rule has been consistently and repeatedly announced by this court in many subsequent cases:

Wilkins v. Ellett, 108 U.S. 256, 27 L. ed. 78;
Johnson v. Powers, 139 U.S. 156;
Hayes v. Pratt, 147 U.S. 557;
Moore v. Mitchell, 281 U.S. 18, 74 L. ed. 673.

The recent case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, of course was concerned with a question of Common Law, but when a question in admiralty involves a right transplanted by the Jones Act from the civil courts, such as the right to sue for wrongful death, we believe the language of the *Erie* case is applicable:

"Except in matters governed by the Federal constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

D. No Unsettled Question of Federal Law and No Departure From Usual Course of Judicial Proceedings

The rule of incapacity of foreign administrators is still accorded full validity in the recent Re-statement of the Law—Conflict of Laws, Secs. 396 and 507.

Beale, The Conflict of Laws (1935 ed.) Vol. 2, pages 1313 and 1315, points out that the right of foreign administrators to sue is dependent on a permissive local statute in cases under the Federal Employers' Liability Acts. The Jones Act applies these Acts to seamen.

In *Brooks v. Southern Pac. Co.* (C.C.-W.D. Ky.) 148 Fed. 986, which was an action under the Federal Employers' Liability Act, the federal Circuit Court held that a foreign administrator cannot maintain a suit under that act in the federal court in the Kentucky District in absence of authorization by the statutes of Kentucky.

This being an admiralty case, it is interesting to note that Benedict on Admiralty (6th Ed.—1940) Vol. 1, Sec. 230, page 43, says:

> "There are no special Admiralty Rules concerning the capacity of parties, whether as infants, incompetents, agents, foreign corporations, and the like. *In these matters the admiralty courts have largely followed the local State practice;* but as they are fully covered by the Federal Civil Rules, *it would seem logical for the admiralty side of the court to apply Civil Rule 17, which expresses what the admiralty practice has actually been,* namely: that actions shall be prosecuted in the name of the real party in interest; that executors, administrators, guardians, trustees of an express trust, parties who have made contracts for the benefit of another, may sue without joining their beneficiaries; that the capacity of an individual to sue or be sued is determined by the law of his domicile, and that of a corporation by the law under which it was organized; *and that in all other cases such capacity shall be determined by the law of the State in which the District Court is held;* also that infants and incompetents may act through general guardians, committees, conservators, next friend or guardian ad litem." (Italics ours)

Rule 17(b), Federal Rules of Civil Procedure, provides as stated in the foregoing quotation from Benedict. Benedict's statement that Rule 17 should govern in admiralty is highly persuasive when we bear in mind that in admiralty, as in the common law, there was no right of action for wrongful death; that the Jones Act (46 U.S.C.A., Sec. 688) in creating such a statutory right of action expressly subjects it to the statutes "conferring or regulating" the similar right of action in the Civil Courts, *i.e.*, the Federal Employers' Liability Act (45 U.S.C.A., Sec. 51). It seems the evident intent of the Jones Act to engraft into the admiralty not only the civil right, but also the civil regulation thereof. In our case, the action of the courts below conforms to Rule 17, adopted pursuant to statutory authorization.

E. Petitioners' Cases

Attempting to show a conflict in the authorities, or an unsettled state of the law needing to be resolved, petitioners cite (Pet. 15, Br. 8) four generalized texts, four decisions of United States District Courts (two from Maryland), one state decision from Mississippi, and three state decisions from Missouri, on the question of capacity of foreign administrators. These are the cases that were relied on by petitioners below. No conflicting decisions from any Circuit Court of Appeals or this Court are cited. And we submit that an analysis of the cases cited fails to show an existing conflict.

Pan Two, 26 F. Supp. 990, 1939 A.M.C. 501, is heavily leaned upon by petitioners (Br. 12). It is a decision by Judge Chesnut of the United States Dis-

trict Court in Maryland, and is mentioned in some of the cited texts as creating a conflict in the authorities. We submit this is based upon an incomplete analysis of the case. It is true that Judge Chesnut discourses at length upon the theory that the administrator in cases like this is a mere trustee for certain beneficiaries, hence the general rule should not apply. But upon scrutiny, the opinion discloses that there had been a change in the statute of Maryland, *and the statute was interpreted as permitting suit by foreign adminisrators in the Maryland state court.* Obviously this renders the result of that case correct under the prevailing rule above discussed, and we submit this is the real basis upon which the decision rests, regardless of the dicta.

Rose v. Phillips Packing Company, 21 F. Supp. 485, is another decision by District Judge Chesnut in the same Maryland district. It was neither an admiralty nor a railway case, but arose in Federal Court because of diversity of citizenship. When the foreign administrator's capacity was challenged, he took out ancillary letters in Maryland, and was substituted as a Maryland administrator. In view of that fact, and the Court's interpretation of Maryland law as permitting suit by foreign administrators, the case cannot be said to create a conflict.

Kirincich v. Standard D. Co., 27 F. Supp. 219, is a decision of the District Court in New Jersey. Again, the same situation prevails, the New Jersey statutes and courts having authorized suits by foreign administrators in that state; hence there is no conflict with the prevailing rule.

Pearson v. Norfolk, etc., R. Co., 286 Fed. 429, is the only other federal case cited by petitioners, and is from the District Court of Virginia. It was a railway case. While the case might be distinguished in some respects, we may concede that it is out of harmony with the general rule. It is cited with approval by Judge Chesnut in *Pan Two, supra.*

However, it is hardly necessary for this Court to resolve any doubt created either by the *Pearson* case or by *Pan Two.* In the first place, these are isolated cases, and in the second place, that duty has been admirably performed already by the Fourth Circuit Court of Appeals.

Ryholt v. Jarrett (1940) 112 F.(2d) 642, *supra.*

The Fourth Circuit Court in the *Ryholt* case frankly stated that it disliked the rule denying foreign administrators the right to sue in states where not authorized, when acting as trustees for certain beneficiaries, but found that the established rules of law required it to hold foreign administrators disqualified in all cases where they are not extended recognition by the local law and practice. The basic unsoundness of the *Pearson* case and of the obiter reasoning in *Pan Two* is strikingly exposed, and since those two cases from Virginia and Maryland arose in districts under the jurisdiction of the Fourth Circuit Court of Appeals, it would seem that any conflict or uncertainty created by those cases, has been effectually resolved by the *Ryholt* case, in harmony with the rule of the other Circuits and of this Court.

The state court decisions cited by petitioners, one

from Mississippi, and three from Missouri (Pet. 15, Br. 8)—

Gulf M. & N. R. Co. v. Wood (Miss.) 146 So. 298;

DeMattei v. Missouri, etc., R. Co. (Mo.) 139 S.W.(2d) 504;

Wells v. Davis (Mo.) 261 S.W. 58;

Shaw v. Chicago, etc., R. Co. (Mo.) 282 S.W. 416—

hardly need analysis or comment, because when the court of last appeal in any state holds that foreign administrators have the right to sue in the courts of their state, then ipso facto such becomes the law of that state, and a federal court sitting therein would follow that rule, both on the Civil and Admiralty side, in accord with the prevailing rule we have discussed. We need merely point out that the Washington Court, in accord with the Washington statutes, has held to the contrary as to the capacity of foreign administrators.

III.

SUBSTITUTION PROPERLY DENIED; COSTS PROPERLY TAXED

A. Question of Substitution

Petitioners made no formal application for substitution of Washington administrators in the courts below. They raised the question obliquely in their "Objections to Form of Decree" filed in the District Court (Tr. 21). That was after exceptions had been sustained. Such a request is not a matter of right; it is addressed purely to the court's discretion. A principal reason for denying it was that there were not then in existence any Washington administrators, nor had

application been made for appointment of such, nor was any showing made that it would be done. The same situation prevailed when the case was heard and decided in the Circuit Court of Appeals. Another reason for denying the request was that a substitution would not have been a mere change of capacity in which the former claimants would continue the claim, but since they were non-residents, disqualified to seek appointment in Washington, it would have meant a complete change of parties on one side of the case.

In all the cases cited by petitioners on this question, including *Missouri, etc., R. Co. v. Wulf*, 226 U.S. 570, and *U. S. v. Powell*, 93 F.(2d) 788 (Br. 26), and the other cases cited, where substitution was allowed, there was no such radical change as a complete substitution of parties on one side of the case; the original party plaintiff was merely allowed to continue the action in the additional or substituted *capacity* of administrator. Even then, none of the cases hold that this is a matter of right; all of them recognize it is a matter of the court's discretion in the particular circumstances involved.

2 C.J.S. 208 states:

> "Although, in a proper case, one claimant may be substituted for another in admiralty proceedings, such substitution cannot be permitted where claimant to be substituted does not submit to the jurisdiction of the court."

Citing:

The Eliza Lines (C.C.D. Mass.) 61 Fed. 308.

See also:

Brooks v. Boston and N. R. Co. (Mass. 1912) 97 N.E. 760;

Vaughan v. St. Louis, etc., R. Co. (Mo. 1914) 164 S.W. 144;

The Princess Sophia, supra, 36 F.(2d) 591, at 594.

39 Am. Jur. 972, Sec. 101, states the rule:

> "In all cases, in fact, the question of substitution of parties is generally one within the sound discretion of the court to determine, in the light of the exigencies of each case, and in accordance with the recognized legal and equitable principles, but substitution may not be made where to do so would contravene the statutory provisions upon this point."

B. Question of Costs

Petitioners cite no cases in point upon their argument that allowance of costs to appellees in the Circuit Court of Appeals was arbitrary. Rule 27 of the present Rules of the Ninth Circuit Court of Appeals provides:

> 2. "In all cases of affirmance of any judgment or decree in this court costs shall be allowed to the appellee, unless otherwise ordered by the court."

As pointed out in appellees' memorandum (Tr. 41) in the Circuit of Appeals on the question of costs, the decision and decree there affirmed the district court on both of the questions involved in the appeal, and the modification to insert "without prejudice" was one of form only. There, as here, petitioners argued earnestly that the decree in the district court would operate as res judicata, barring any further claim. Neither the District Court nor these respond-

ents ever suggested or contended so (Tr. 35, 41). The dismissal below was not on the merits, but for incapacity of the parties, hence could not possibly be with prejudice or res judicata upon claims presented by proper parties. The cases cited by petitioners, such as *Chicago etc. R. Co. v. Schendel*, 270 U.S. 611, are all cases where hearings had been held on the merits, resulting in res judicata.

We submit that the allowance of costs to appellees in the Circuit Court of Appeals, upon affirmance with a modification of form only which was never resisted, nor requested in the District Court, is entirely in accord with the prevailing rules and practice. It again is a matter of discretion in the lower court, under its Court Rule 27, *supra*, and no abuse thereof is shown.

CONCLUSION

We respectfully submit that petitioners application for writ of certiorari was not made in time. The three months' time began to run upon entry of the decree in the Circuit Court of Appeals on April 22, 1942. No pleading was thereafter filed complying either in form or in substance with the requirements for a petition for rehearing, and no rehearing on the merits was entertained. Hence running of the time was not suspended, and it expired July 22, 1942.

We further respectfully submit that the decision in both of the lower courts is not in conflict with any other Circuit, nor with applicable local decisions, nor with decisions of this Court; that there is no unsettled question of federal law involved, nor any departure

from the usual course of judicial proceedings. On the contrary, the decision in both lower courts and on all points is in full accord with the other Circuits and with a long line of decisions of this Honorable Court, and follows the rules prevailing throughout the United States; that there are no dissenting decisions which have not already been overruled by the Court of Appeals of the Circuit where they arose.

Therefore we submit that no valid reason exists calling for a review by writ of certiorari in this case, and that the petition for same should not be entertained or granted.

Respectfully submitted,

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